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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

Re: ***AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services*, WC Docket No. 03-133**

Dear Ms. Dortch:

I write on behalf of AT&T Corp. to address the topic of whether the Commission has authority to prohibit incumbent local exchange carriers from assessing intrastate access charges on enhanced prepaid card calls that indisputably include interstate communications. As detailed below, the Commission has clear authority to regulate these services as interstate services.

First, the Communications Act gives the Commission jurisdiction over "interstate communications by wire."[1] "Interstate communication" is defined as communication or transmission between one state or the District of Columbia and another.[2] When using AT&T's enhanced prepaid card service, the calling party calls the

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1 47 U.S.C. § 152(a) ("The provisions of this chapter shall apply to all interstate and foreign communications by wire"). The Act defines "communications by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(52).

2 47 U.S.C. § 153(22).

enhanced service platform and the platform transmits a stored, non-call-routing related message to the calling party. This transmission is indisputably a "communication by wire," and it is also indisputably an "*interstate* communication," 47 U.S.C. § 153(22), when, as in almost all cases, the transmission begins in one state and ends in another. This communication takes place regardless of whether the cardholder communicates with any third party (*i.e.,* if the called party does not answer or the calling party hangs up without attempting any further communications). Because virtually all enhanced prepaid card calls contain an "interstate communication," the Act unambiguously gives the FCC jurisdiction over the service. The interstate communication is integral to the service, and therefore the presence of that interstate communication gives the Commission statutory authority to exercise jurisdiction over the entire service.

Indeed, any attempt to separately assess interstate access charges on the interstate communications that take place on an enhanced prepaid card call and intrastate access charges on other communications on the same call would be unprecedented and impracticable. The interstate communication of non-call-routing related information (the stored advertising message) delivered from the platform to the cardholder that takes place on enhanced prepaid card calls could only trigger *inter*state access charges. Further, a substantial number of enhanced prepaid card calls consist *solely* of a communication between the cardholder and the platform; these calls are purely interstate under any theory. The ILECs' theory, however, would require separate identification of the interstate and intrastate portions of each individual call, and the application of different access charges to different portions of the same call. We are aware of no instance in which the FCC has ever subjected the same call to both interstate and intrastate access charges.

Enhanced prepaid card services are thus jurisdictionally interstate for the same reasons that underlie the Commission's "mixed use" doctrine. As the Commission explained in *GCI* v. *ACS*, 16 FCC Rcd. 2834, ¶ 24 (2001),"[i]t is well settled that when communications, such as ISP traffic, are jurisdictionally mixed, containing both interstate and intrastate components, the Commission has authority to regulate such communication." *See also Intercarrier Compensation for ISP-Bound Traffic*, Notice of Proposed Rulemaking, 14 FCC Rcd. 3689, ¶ 18 (1999); *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶¶ 57-58 (2001); *GTE Tel. Operating Cos.*, 13 FCC Rcd. 22466, ¶¶ 22-26 (1998) (DSL services should be tariffed at the state level only where the service is *entirely* intrastate).

The Commission has long held, for example, that special access services are jurisdictionally interstate *in their entirety* even if only 10% of the traffic they carry is interstate.[3] Like dial-up calls to ISPs and the purchase of private lines or special access, enhanced prepaid card services provide a mix of interstate and intrastate

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3 *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd. 5660, ¶ 6 n.7 (1989).

communications which cannot practicably be separately identified, tracked and billed. It is therefore perfectly appropriate and lawful for the Commission to exercise interstate jurisdiction over the entirety of the enhanced prepaid card service. In fact, the case for interstate treatment of enhanced prepaid card service is, if anything, even more compelling than for special access and ISP-bound traffic: (i) virtually all calls involve some interstate communication in the form of a non-call-routing related advertising message from the platform to the calling party; (ii) 17-20% of calls involve *only* an interstate communication with the platform; (iii) more than 65% (*i.e.*, much more than 10%) of all enhanced prepaid card calls are *entirely* interstate (or international), on a calling-to-called party basis, even disregarding the interstate communication from the platform to the calling party; and (iv) many other calls involve multiple interstate communications with the platform interspersed with multiple calling/called party communications that may be between parties in the same or different states. Because it is impracticable to separately identify and rate each of these various call components, as the ILECs' theory would require, and because far more than 10% of the communications at issue are interstate, the Commission's precedents, as affirmed by reviewing courts, fully support the Commission's assertion of interstate jurisdiction over the entire service.

The Bells themselves have emphasized these very points in their comments in the pending VoIP rulemaking proceeding. The Bells argue that all VoIP services should be deemed jurisdictionally interstate, even though many VoIP calls are in fact intrastate, because of the impracticality of separately identifying and rating interstate and intrastate VoIP communications.[4] Indeed, SBC expressly argues that the Commission should require *interstate* access charges for purely intrastate VoIP calls, because of the difficulties in identifying intrastate calls and to further the FCC's policy of promoting the development of VoIP services.[5] That position is starkly at odds with SBC's position here, even though the Commission has no less of an interest in maintaining a uniquely affordable offering aimed at low-income and other protected groups, the economic viability of which would be destroyed by the imposition of intrastate access charges.

Indeed, to conclude that the Act *requires* separate jurisdictional treatment of jurisdictionally mixed EPPC traffic, the Commission would have to overrule a number of important rulings. For example, the Commission has consistently held that the entirety of an Internet session is to be deemed jurisdictionally interstate – notwithstanding the conceded presence of many intrastate communications and, indeed,

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4 *IP-Enabled Services*, WC Docket No. 04-36, SBC Comments at 25-33 (May 28, 2004); Verizon Comments at 32-39 (May 28, 2004); BellSouth Comments at 11-14 (May 28, 2004); Qwest Comments at 25-36 (May 28, 2004).

5 SBC VoIP Comments at 77-79. As AT&T explained in its *IP-Enabled Services Comments,* WC Docket No. 04-36, at 21-28 (May 28, 2004), legacy access charges should *not* apply to VoIP services.

some Internet sessions comprised *solely* of intrastate communications.[6] If the mere possibility of estimating intrastate and interstate components requires intrastate regulation of some portion of the service (*e.g.,* application of intrastate access charges), then the Commission's assertion of exclusive regulatory authority over Internet access traffic is unlawful. Similarly, it is undoubtedly possible to estimate the percentage of special access traffic that is intrastate and interstate, and yet the Commission has long held that special access facilities are jurisdictionally interstate *in their entirety* even if only 10% of the traffic they carry is interstate.[7] Again, if the mere possibility of estimating the intrastate portion of communications requires intrastate classification or the application of intrastate access charges to those minutes, then the Commission's "10% rule" is unlawful.

Second, abdicating interstate authority on these calls would frustrate the important federal policy of maximizing access to interstate services. By partnering with discount stores and other advertisers, enhanced prepaid card providers are able to offer uniquely affordable long-distance services aimed at segments of our society that have been traditionally excluded from access to the telecommunications network. *See*, *e.g.*, July 27, 2004 Letter from Pedro Rodriguez, Executive Director, Action Alliance for Senior Citizens of Greater Philadelphia to FCC Chairman Michael Powell ("senior citizens are among the fastest-growing consumers of pre-paid cards. . . . senior citizens should not be asked to take money from their pockets and hand it over to four of the largest companies in America"); July 19, 2004 Letter from Reverend Willie T. Barrow, Chairperson Emeritus, Rainbow/PUSH Coalition to FCC Chairman Michael Powell ("Let us take a very real, practical look at who uses prepaid calling cards in the African-American community: Consumers living on fixed incomes; consumers with bad credit; students calling home from school; military personnel living away from home"); July 15, 2004 Letter from William F. Hanf, Greater Columbus Ohio Counsel, Navy League of the U.S. to FCC Commissioners ("The Navy League believes you should help make telecommunications alternatives more affordable and accessible to them, not less so. It is simply unfair to send young men and women on active duty overseas, or to a base far from home, and then say, 'Oh, by the way, now we are going to make it more expensive to call your family"). And, given customer preferences and the inherent mobility of prepaid calling cards, it is obviously infeasible to offer an interstate only service.

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6 *See ISP-Bound Traffic Order* ¶¶ 57-60; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Order, 14 FCC Rcd. 3689, ¶ 18 (1999) (acknowledging that "some Internet traffic is intrastate"). Given the prevalence of local caching of content, many ISP-bound calls may be predominantly (or even exclusively) intrastate.

7 *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd. 5660, ¶ 6 n.7 (1989).

It is vitally important that the Commission assert jurisdiction over these interstate services, to keep these uniquely affordable cards as an *option* available to traditionally excluded groups. Indeed, for recent immigrants and the poorest of the poor, prepaid cards are often a substitute for wired or wireless phone service and are their *only* way to make telephone calls. These cards, which are typically sold exclusively at the discount stores, military exchanges, and other venues with which the card provider has partnered, are an ideal vehicle for these groups to obtain access to the telecommunications network. The Commission has a strong interest in maintaining the availability of such options for lower income end-users under both its traditional universal service authority under 47 U.S.C. § 151 – which requires the FCC to make the telecommunications network "available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex" – and under its 1996 Act universal service authority, which must be based in part on the principle that services are available at rates that are "affordable." 47 U.S.C. § 254(b)(1), (i). Indeed, because enhanced prepaid cards are disproportionately purchased by low-income, minority, and other protected groups, it would be inequitable to force those end-users to bear the burden of intrastate access charges, which concededly contain implicit subsidies that violate the Act. *See* 47 U.S.C. § 254(f), (k).

Third, treating enhanced prepaid card providers as providing discrete interstate and intrastate services (and forcing them to pay intrastate access on some portions of some calls) would lead to unlawful discrimination between facilities-based and resale providers. Many prepaid card providers are non-facilities-based resellers that obtain 800 services from unaffiliated IXCs to provide the connection between their cardholders and the platform, and separately obtain long distance services to route communications from the platform to called parties, including those providers that use two-stage VoIP calling for prepaid cards. Moreover, when, as is almost always the case, the platform is in a different state than the calling and called parties, these prepaid card providers obtain *interstate* 800 services from unaffiliated carriers, and they resell *interstate* long distance service purchased from an IXC. Ceding Commission jurisdiction over enhanced prepaid card calls that include interstate communications would dramatically distort competition and harm consumers by tilting the competitive playing field arbitrarily to favor prepaid card resellers, as these resellers would likely continue to treat the separately purchased interstate 800 inbound service to the calling card platform and the interstate outbound service to terminate calls to called parties as creating separate interstate "calls."

It would be manifestly arbitrary, unreasonable and discriminatory for the Commission to treat the underlying telecommunications service as interstate when purchased from an unaffiliated carrier but intrastate when self-provided. Such a rule would discriminate against facilities-based prepaid card providers, and would place them at a severe disadvantage *vis-à-vis* providers that relied on capacity from other carriers. Indeed, such a rule would create perverse incentives for all service providers to lease capacity from other carriers (or agree to lease from one another) rather than self-provide telecommunications over their own facilities. There is no defensible basis for such a policy and it should be rejected. *See* AT&T July 21, 2004 *Ex Parte,* WC Docket No. 03-133, at 3-5.

In short, the FCC unquestionably has the authority to assert interstate jurisdiction over enhanced prepaid card services. If the Commission were to abdicate that authority, and permit the ILECs to assess intrastate access charges, it would accomplish nothing other than removing a uniquely affordable long-distance option for low-income and military end-users, while further inflating ILECs' already excessive profit margins and creating unlawful discrimination in favor of resale providers. The Commission should assert jurisdiction and clarify that enhanced prepaid card services are *interstate* services and that, accordingly, where enhanced prepaid card service providers purchase access services only interstate access charges apply.

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

/s/

Judy Sello

cc: Jeffrey Carlisle
Tamara Preiss
Steve Morris
Paul Moon